88-1071

Supreme Court, U.S.
FILED
NOV 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO._____

JESSIE GETER, Administratrix of the Estate of THOMAS GETER, JR., Deceased,

PETITIONER,

Versus

RICHARD WILLE, Sheriff of Palm Beach County, Florida, and GERALD TOLES, Director of Corrections of Palm Beach County, Florida,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI AND ARGUMENT IN SUPPORT THEREOF TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

J. EARL SMITH
ATTORNEY FOR PETITIONER
P. O. BOX 728
DOTHAN, ALABAMA 36302
TELEPHONE NO. 205/792-3188

8 pp

(a)

QUESTIONS PRESENTED

I

Was the reversal by the U. S. Circuit Court of Appeals for the Eleventh Circuit of the Judgment and Verdict of the U. S. District Court for the Southern District of FIorida (Judge Jose' Gonzales presiding) for that Court's denying a Motion for a directed verdict contrary to that Circuit's own decisions, the decision of other U. S. Circuits and of this Court, under the following circumstances:

1. Where the plaintiff, mother, and administratrix of her deceased son's estate, was awarded compensatory and punative damages against the defendant sheriff and jail administrator of the Palm Beach County, Florida jail in a 42 U.S. 1983 Civil Rights action, for the reason that the said son, an inmate of that Jail, had died of starvation while incarcerated in that Jail.

2. Where this inmate, one Thomas Geter, was known at the time by the Palm Beach County

Jail to be suffering with chronic schizorphrenia, having been returned to this Jail from a mental institution where he had been intensively treated for said mental disease and released to the Jail as "improved".

3. Where, at the time of his return to the Jail, he weighed one hundred and eighty-six (186) pounds and was in good physical health, but on the last time he could be placed upon scales, he weighed one hundred and thirty-six (136) pounds, having been unable to swallow nourishment for over a two weeks period, either for physical reason or demented belief that he could not swallow.

The question then becomes "did the U.S. District Judge err, as the Circuit Court opined, when he denied the defendant's Motion for a directed verdict" on the evidence produced by the plaintiff, viewed in a light most favorable to her, i.e., that evidence showed the defendnts either knew, or in proper administration of their duties,

should have known of the atrocity in their facility, or did the evidence, as the Circuit Court held, only present a simple matter of respondent superior thereby relieving the defendants' from liability.

II

There is also the question that the U.S. District Court permitted the recovery of punative damages to stand. While the Eleventh Circuit stated in it's footnote on page 3260 that this raised a moot question, it nevertheless cited this Court's decision in City of Newport v. Fort Concerta, Inc., 453 US 247, 101 S.Ct. 2748, holding agencies are not liable for punitive damages in Section 1983 action. Petitioner says that this Court's decision and those of the Circuit distinguish between a governmental agency, far removed from the conduct of actual functions of it's personnel on the one hand and those immediately in charge of these functions.

(b)

The caption in this cause contains all the names of the parties to the proceeding in the Court whose Judgment is sought to be reviewed.

(c)

TABLE OF CONTENTS

	Page
Questions Presented for Review.....	1
The Parties to The Proceeding.....	4
Table of Contents.....	i
Table of Authorities.....	ii,iii
Grounds on Which Jurisdiction is Invoked.....	5
(i) Date of Judgment to be Reviewed.....	5
(ii) Date of Order on Rehearing..	5
(iii) Cross Petition (N/A).....	
(iv) Statutory Provisions Conferring Jurisdiction....	6
Constitutional Provisions and Statutes	6 and Appendix
Statement of the Case.....	7
State Court Judgment (Not applicable)	
Review of Judgment of Federal Court..	14
(j) Argument.....	18
(k) Appendix.....	58

TABLE OF AUTHORITIES

Page

Ancata v. Prison Health Services, Inc., 76 F 2d 700(1) Cir.1985..... 39

Berner v. British Commonwealth Pacific Air Lines, Ltd., 1965 CA2NY 346, F2d 532,Cert.den. 382 US 983, 15 L Ed 2d 472, 86 S Ct., 559..... 37

Caperci v. Huntoon, 397 F 2d 799, (1st. Cir. 1968), Cert. den. 89 S Ct 299..... 54

City of Newport v. Facts Concerts, Inc., 453 U.S. 247, 272, 101 S.Ct., 2748, 2762..... 3,49

Estelle v. Gamble, 429 US 97 1976, 97 S. Ct. 285..... 38

Gilmer v. City of Atlanta, 774 F 2d, 1495 (11th Cir. 1985)..... 44

Gordon v. Norman, 788 F 2d, 1194, (6th Cir. 1986)..... 51

Love v. Sheffield, 777 F 2d, 1453, (11th Cir. 1985)..... 43

McClellan v. Facteau, 610 F.2d 693, (10th Cir. 1979)..... 45

McDaniel v. Carroll, 457 F 2d 968, (6th Cir. 1972)..... 53

Mega v. City of Holyoke, etc., 497 N.E. 2d, 1..... 46

Miranda v. Mundy, 770 F 2d, 255 (1st Cir. 1985)..... 41

TABLE OF AUTHORITIES

	Page
Morales v. Haines, et al., 486 F. 2d 880 (7th Cir. 1973).....	54
Slakan v. T. C. Porter, 737 F.2d, 368, (4th Cir. 1984).....	46
Sullivan v. Little Hunting Park., Inc., 396 US 229, 9 S. Ct.400, 24 L.Ed. 2d 386 (1969).....	51

(d)

The unofficial report of the Opinion in this cause is:

Jessie Geter, Administratrix of The Estate of Thomas Geter, Jr., Deceased,

Vs

Richard Wille, Sheriff of Palm Beach County, and Gerald Toles, Director of Corrections of Palm Beach County, Florida

No. 87-5498

The Official Report is:

Geter v. Wille, ___F 2d____

The Order denying the Motion for Rehearing en banc is reported unofficial at

(e)

The Statement of Grounds on which Jurisdiction of this Court is involved:

(i) The date of the Judgment and entry of Judgment to be reviewed is June 14, 1988

(ii) The Order overruling this Petitioner's Motion for a Rehearing en banc was entered on August 15, 1988

(iii) Not applicable.

(iv) Jurisdiction to review this cause is conferred upon this Court by provision of 28 U.S.C. 1254(1).

(f)

Constitutional Provisions and Statutes involved in this case:

The Fifth Amendment to The Constitution of the United States (text included in Appendix)

The Eighth Amendment to the Constitution of the United States (text included in Appendix)

The Fourteenth Amendment to the Constitution of the United States (text included in Appendix)

Statutes

42 USC 1983 (text appearing in the Appendix)

(g)

STATEMENT OF CASE AND FACTS MATERIAL TO QUESTIONS PRESENTED

Petitioner's son, the decedent, Thomas Geter, was arrested and placed in the Palm Beach County Jail in June, 1980. The Palm Beach County Jail is under the direct control of the defendants in this action. Sheriff Wille testified, through deposition, that he was responsible for what went on in his Department, subject to funding (including the provision of medical care to inmates). (The deposition of Sheriff Wille, page 11).

Geter was found incompetent to stand trial on June 11, 1981, and sent to the North Florida Evaluation Treatment Center in Gainesville, Florida. There, he was diagnosed as suffering from chronic undifferentiated schizophrenia, a condition from which Geter had suffered for many years. He was treated at the North Florida Evaluation Treatment Center, and after protracted and extensive treatment on a very potent drug,

Melaril, he was discharged as improved and competent to stand trial on October 1, 1981.

Upon arriving at the Palm Beach County Jail, Geter received a medical examination and was determined to be in good physical condition, weighing 183 pounds. (R3-39-1).

In late March, 1982, Geter began to complain to jail officers that he had a sore throat and could not swallow. He reported his condition to Circuit Judge Edward Rodgers on April 5, 1982, during Judge Rodgers' tour of the jail facility. (R3-82). He was finally seen by the jail's physician on April 7, 1982, where he was diagnosed as having tonsillitis and was given penicillin by injection, due to his inability to swallow. At this time, Geter weighed 159.5 pounds, a loss of 23.5 pounds from his entry weight.

On April 10, 1982, Geter continued to complain of his inability to swallow, and was prescribed ice collars and ice cubes. On April 14, 1982, Geter weighed 144 pounds

(a weight loss of 15 pounds in one week, and a total loss of 39 pounds). At this time, the doctor was unable to find any medical reason why Geter could not swallow; however, no mental condition was considered, notwithstanding Geter's history of mental illness, and Geter was not seen by a psychiatrist.

On April 16, 1982, Nurse Mary Irwin, an employee of the Palm Beach County Sheriff's Department, inquired of Jail Supervisor Lieutenant Kerr as to whether Geter had been found competent to stand trial, stating that if he were competent, he had a right to starve to death. Nurse Irwin also pointed out that Geter would, in fact, die if he continued on his present course. Geter's weight at this time was 141 pounds. Also, on this date, all medications for Geter were discontinued.

On April 19, 1982, Geter still complained of his inability to swallow, and his weight was 140.5 pounds. On April 21, 1982, his

weight had fallen to 136.5 pounds. (R3-39-2).

During this period of Geter's declining condition, he contacted his mother in Montgomery, Alabama, and informed her that he was ill, and could get no one to help him. His mother came to West Palm Beach to see about his condition.

When Ms. Geter was allowed to see her son, he did not immediately recognize her. Shortly thereafter, he began vomiting and was removed from the visiting area. (R3-102). Ms. Geter went to Judge Rodgers to beg him for assistance in obtaining help for her son's condition. (R3-83). Judge Rodgers again sought to intervene on behalf of Geter, even to the point of offering to enter an Order requiring the Sheriff's office to have Geter independently examined. (R3-84). Nevertheless, the Sheriff's office continued to assure Judge Rodgers that there was nothing wrong with Geter, and that action by the Judge was unnecessary. (R3-84). After this, on April 22, 1982, Geter was taken

to a throat specialist who could not examine him due to Geter's inability to swallow the barium necessary for x-rays. (R3-39-2). The opinion of the Eleventh Circuit seems to adopt the respondents' position, and calls Geter's actions voluntary and an unwillingness to cooperate.

The next time Ms. Geter saw her son, Geter was brought into the visiting area by two guards, where he collapsed. Throughout this visit, he had to be held up by the guards, due to his weakened condition. He was so weak that he was unable to talk to his mother. (R3-104).

Finally, on April 28, 1982, deputies Robert Cross and Anthony Henry went to Geter's cell to take him to the Clinic. They found Geter in his bunk, unable to get up or to dress himself. Deputy Henry observed Geter to be secreting blood from his rectum. (R3-42). Geter was unable to dress himself and had an "awful odor" on him. (R3-62).

The two deputies carried Geter to the elevator where he collapsed. He was then taken to the Clinic. (R3-43,44).

At the Clinic, Geter could not be weighed, due to his inability to stand. (Geter was also taken to the Clinic on April 26th, where he could not be weighed for the same reason). The jail doctor observed Geter to be "dehydrated and markedly thinner" (his weight loss by this time was nearly fifty (50) pounds from his October weight). After he was examined, he was ordered to be returned to his cell. When Deputies Cross and Henry complained that Geter would die if returned to his cell, they were rebuffed by Nurse Irwin, who indicated that Geter's condition was of his own making, and he could die in 306 (his cell) as well as anywhere. Instead of taking Geter back to his cell, the deputies took him to the first floor booking area.

Approximately one and a half hours

after being taken to the Clinic, the jail doctor decided to hospitalize Geter because "he was dying". (R3-39-3). Geter was taken to Good Samaritan Hospital, where he appeared to be unconscious upon arrival. Upon entry into the emergency room, Geter was determined to be in full cardiac and pulmonary arrest. While his heartbeat was restored, Geter remained comatose until his death at 2:00 P. M. the next day, April 29, 1982. (R3-39-4).

The medical examiner's report indicated that the cause of death was acute enterocolitis with severe dehydration and electrolyte imbalance, coronary arteriosclerosis, pulmonary congestion and edema. This condition was considered to be incidental to malnutrition. (Plaintiff's Exhibit "2", page 1, i.e., Medical Examiner Report).

At no time during the onset of Geter's illness was any attempt made to have him mentally examined by a psychiatrist.

Brian Pimm, Prison Inspector for the

Florida Department of Corrections conducted a full scale investigation on the death, as required by Florida law. (R3-4). Inspector Pimm learned of Geter's death through reading an account of the same in the press. When he contacted the defendants' representatives concerning the death, he was told they overlooked notifying him. (R3-132). Mr. Pimm concluded that the Sheriff had failed to provide a certain chain of authority to prepare the Jail staff to act and take responsibility in incidents such as the present case, contrary to Jail Policy and Procedures 3981. (R3-21,22).

As is required by Rule 29, Pagagraph (i), this Statement of the Case shall also reflect that the Court of the first instance, i. e., the U. S. District Court for the Southern District of Florida had jurisdiction of this this cause by virtue of 42 USC, 1983.

(j)

SUMMARY OF ARGUMENT

This being an action for the deprivation of a decedent jail inmate's civil rights, whereby he was caused to starve to death by the flagrant disregard for his illness, we will be presented the distinction in the applicable law upon which the Eleventh Circuit reversed the verdict of the District Court and the authority applicable to the facts that brought about this inmate's death.

The Justices of that Circuit likened the atrocities here occurring as they bore on any responsibility of the Sheriff (who testified that he was responsible for this Jail's operations) and the responsibilities of the Director of Department of Corrections to the responsibilities of a City Council or a County Board Commission, in that the Justices found there was no policy or directive issuing from these officers.

The petitioner will present in her

argument the abundant authority that the immediate in-charge keepér-of-inmates, whether it be a Warden, Chief of Police, or as here, a Sheriff and Director of Corrections are directly responsible for the welfare of their inmates, insofar as conditions affecting them are concerned, if they had knowledge of such conditions as in due course of their duties, they should have known of such condition or conditions. Having thus shown such responsibility to have attached to these respondents, the petitioner will graphically demonstrate how the avalanche of pleas and begging made to the very conduits the respondents set up for them to take corrective action, and prevent the unnecessary death went unheeded. Such pleas, request and direction being made by the inmate, a Circuit Judge, the petitioner, deputy employees, and other inmates.

Likewise, the argument will point up

the award of punative damages in this case was properly awarded for the very reason and the very distinction of the case of a Board of Commissioners (as in the authority used to refute this reward) and the direction action or inaction of the person directly responsible for the safe keeping of an inmate.

ARGUMENT
(j-1)

In the Court's opinion, "GETER v. WILLE", Eleventh Circuit, No. 87-5498, it is directly stated in footnote at page 3259:

> "Because the plaintiff sued the defendants in their official capacity, this is, in effect, a suit against Palm Beach County."

Thus, the Circuit Court determined their decisions prohibited a section 1983 action against such governing body if there was an absence of clear policy or directive of said governing body shown by the evidence to have caused the callous disregard and total indifference, resulting in Geter's death. While made in good faith, this observation is just not factual. Sheriff Wille testified that the Sheriff's Department was an entity in which he was totally responsible. The operations of that facility were as divorced from the governing body, The County Board, to the same degree and in the very same manner as the United States Government is to the Warden of a Federal Prison. That such separation of

power, functions and operations in the latter example merits just this very type of action against a Warden has been upheld by this Court in an array of cases, and will be amplified in the authorities hereinafter appearing.

Likewise, there seems to appear in the opinion the innuendo that the inmate was responsible, or consciously brought about his own death:

> "refused to eat or drink, literally starving himself to death." (p. 3257).

Also, the opinion infers the defendant's facility was acting properly in handling the inmate case by pointing out that when they could find no medical reason why he could not swallow, he was referred to a private throat specialist, who desired to make x-rays on the swallowing of barium. Much of this appears to be almost verbatum extracts from respondents' (appellants) brief. While this is quite proper from a procedural standpoint, it completely overlooks the evidence produced by the petitioner and obviously believed by the Jury.

These observations are preliminarily made to demonstrate that had the Eleventh Circuit put these matters in proper prospective, plaintiff's case overwhelmingly meshed with and was consistent with the law pronounced this Court, their own decisions and those of other Circuits. Indeed, the petitioner, the plaintiff, out of an abundance of precaution, named, along with the Sheriff and Director of Corrections, the County Board of Commissioners of Palm Beach County. On the defendants' motions (there were several), District Judge Jose' Gonzales granted the motion as to the County Board; on the same authority, the Circuit Court reversed the verdict against the Sheriff and Director, i.e., that there was no policy or directive issuing that could be said to have caused the inmate's starvation. The District Court just as adamantly denied said motion against these defendants, as well as the motion for a directed verdict, distinguishing between the responsibility of a governing body, which

had many departments whose functions were far removed from the governing work of the Board, Council, or a Chief over many Departments. Here, this was the Sheriff's and his Directors' own jail and its' functions were their direct, daily responsibility.

However, the authorities hereinafter submitted and discussed do make provision for protection of a Warden, a Sheriff, a Director or Jail Supervisor against 42 U. S. 1983 claims and suit where the conduct of an employee of an incarcerating facility is so sudden or so immediate and direct that the facility could not be expected to know of the singular act that maimed, or in some, caused injury or death to an inmate. These cases do rightfully hold that such sudden acts out of context of normal proceduce cannot create liability on the Charge Person, as his responsibility could only be that of <u>respondeate superior</u>, and as such gives no rise to a 42 U.S. 1983 civil rights claim. In following the Eleventh Circuit's decisions, as well as

those of this Court and other Circuits under such circumstances, this petitioner could not have prevailed.

The facts, the evidence, in this case, are so far removed from the situation covered by the nature of the parties sued and the facts upon which they were litigated, that the Eleventh Circuit decision places it in conflict with all controlling authorities.

Again, before eluding to the authorities and their pertinence here, the petitioner would submit the manner the facts heretofore set forth were displayed at the trial.

On or about the 29th day of April, 1982, Inspector Brian Pimm, Internal Affairs Investigator, State of Florida, Department of Corrections, read a newspaper account appearing in the Palm Beach News, Palm Beach County, Florida, reporting the death of Thomas A. Geter, an inmate in the Palm Beach County Jail. As it was Inspector Pimm's duty to investigate such death, he contacted the said jail's officials and on May 3, 1982, he commenced such investi-

gation (R3-5). In the course of that investigation, he interviewed thirteen (13) witnesses and reviewed twenty-eight (28) documents. His report of this investigation was admitted as Plaintiff's exhibit "4" (R3-39). This investigator's testimony at the trial, as well as the witnesses in said investigation, follows the import of this investigative report. It was from such report and testimony that the Jury heard evidence (hereinafter described), of the kind of diabolical program, policy and program such that this inmate was subjected to at this facility (and the operation thereof) for which these defendants were responsible. That they were responsible for the kind, quality, and character of medical department functions is made clear in the testimony of the defendant Wille, appearing in his deposition admitted in evidence at the trial (R3-98-4, 5, 11).

Before making reference to such evidence, however, it is in order to point out that every instruction requested by the defendant

was granted, including the instruction that the fact-finders look to the evidence for the affirmative link to the defendants, and the brutal way the inmate, Geter, was treated, and the way he was allowed to die.

Concerning the fact-finders' deliberation over the instructions given, on the evidence they had heard, they acted with the utmost caution in their desire to clearly understand the same, and during said deliberation, sought information on the charge. The colloquy that then occurred between the Court and counsel on the Jury's said query is as follows:

> "THE COURT: Be seated, please. I have a question from the jury. It says, under plaintiff's facts to prove, must the preponderance of the evidence apply to all five facts to prove, in order to find for the plaintiff; Joseph D. Aaron, Foreman.
>
> "They're referring to this page in the jury instructions, which they have, which says, in order to prove their claims, the burden is upon the plaintiff to prove by a preponderance of the evidence the following facts:"
>
> "One, that the defendants, Wille and Toles, knowingly, and willfully, failed to provide critical medical

care to the decedent."

"Two, the acts of the defendants, Wille and Toles, amounted to a deliberate indifference with Thomas Geter, Jr.'s serious medical needs."

"Three, the defendants, Wille and Toles, acted under color of some policy, custom, or regulation issued by the Sheriff of Palm Beach County."

"And five, that was the defendants' acts and conduct were the proximate cause of injuries and subsequent damage to the plaintiff?"

"And, I think that the correct answer to that question is yes. Correct? So, I am just going to write, yes, and send it back to them." (R5-299).

With the above observation in mind, plaintiff asks the Court to consider the following evidence that the Jury considered?

Thomas Geter was committed to the Palm Beach County Jail on June 4, 1980. On June 11, 1981, he was transported to a mental health center at Gainsville, Florida, where he was diagnosed as suffering from chronic schizophrenia. He was found to be in remission on September 10, 1981, and was returned to the Palm Beach County Jail on October 1, 1981. (R3-39-1). While in the mental heath center, and until October of 1981, he was given Milaril

in large dosage (200 milligrams twice a day for a week), and was then given 50 milligrams three times a day. Said medication was completely stopped by October, 1981. (R4-123).

The Jury heard testimony of a psychiatrist who submitted impeccable credentials for practice of psychiatry in the states of Florida, Alabama and Georgia (R4-114), and his testimony, after reviewing all of the records concerning this inmate, was that his condition demanded continuous treatment. By continuous treatment, he meant:

"Forever. Forever, sir." (R4-123).

On his return to the Palm Beach County Jail, under the direction and control of Sheriff Wille and Director Toles, he was given a physical examination and was found to be in good physical health, weighing 183 pounds. In late March, 1982, Geter began to complain to officers and nurses that he had a sore throat and could not swallow. This continued for about one (1) week, but he was unable to persuade anyone to allow him to see

a physician. One of the deputies, Vito Colluci, asked his supervisor to intervene and on April 4, 1982, an antibiotic and Tylenol were prescribed to take orally. (R3-39-1). After this inmate's complaints of inability to swallow became acute, Circuit Judge Edward Rodgers happened to make a routine inspection of the jail on April 5, 1982. These defendants provided a representative, a deputy sheriff, to accompany the Judge on his inspection. When Geter saw Judge Rodgers, he appealed to him to get him some medical help. Judge Rodgers, in turn, instructed the defendants' representative to secure such help, and was assured. it would be forthcoming. (R3-82). On April 7, 1982, the jail's contact physician diagnosed the condition as tonsillitis. On that date, Geter's weight was 159½ pounds. Since Geter complained he could not swallow, the doctor ordered his medicine given by injection. His meals were liquified and he was given ice cream. The housemen and deputies reported that the meals were returned

not eaten, and the ice cream Geter held against the outside of his throat. He continued to assert that he could not swallow, and by April 14, 1982, his weight had dropped to 144 pounds. The doctor found no medical reason why Geter could not swallow.

On April 16, 1982, Nurse Irwin contacted Jail Supervisor Lt. Robert Kerr, asking him to contact Circuit Court Judge Edware Rodgers and find out if Court ordered psychiatric examinations executed in February found Geter competent. If Geter continued on his present course, Irwin told Kerr, he would die. If competent, Irwin continued, it was his right to do so. Instead of contacting Judge Rodgers, Kerr contacted the prisoner's attorney, Mr. Dean Wilbur, and informed him of Geter's condition. It should be noted here that jail procedures (Order 39-81) clearly state that responsibility for inmates' access to medical care is the exclusive responsibility of the medical department. Clinic notes on this date indicate that medication was discontinued and

Geter's weight was 141 pounds.

Geter's body weight continued to decline. Clinic notes indicate 140½ pounds on April 19, 1982 and 136½ pounds on April 21, 1982. He continued to insist that he could not swallow. (R3-39-2).

On April 22, 1982, Judge Rodgers again intervened, and at his insistance, Geter was seen by a private throat specialist, a Dr. Bracey, who ordered x-rays taken at Good Samaritan Hospital, but due to Geter's claim that he could not swallow the necessary barium, he was returned to the jail. Judge Rodgers stated that the medical department at the jail continually assured him that Geter was just feigning illness. (R39-2), (R3-84).

On April 23, 1982, this inmate's weight had dropped to 136 pounds. Attorney Dean Wilbur, counsel for Geter, came to check on Geter's condition and the nurse on duty told him that Geter was faking, and that he was eating when no one was watching. (R3-39-3). On April 28, 1982, Deputies Robert Cross and

Anthony Henry testified both at the investigative hearing and again at the trial, that they went to the cell where Geter was placed, to bring him to the clinic, but that Geter was unable to get off his bunk and dress himself without their assistance, and they literally carried him to the elevator and up to the clinic. It was not possible to weight Geter on April 26th or 28th, due to his weakened condition, and Dr. DeMeo noted that Geter was dehydrated and markedly thinner. Hence, from the time Geter was returned from the mental institution until April 23, 1982, his weight had dropped from 183 pounds to 136 pounds. How much weight he lost in the next five days is not possible to know, as he was too weak to be weighed. (R3-39-3). After the examination, the deputies were told to return Geter to Cell 306, but they refused, saying Geter was too ill and would die if returned to his cell. But Nurse Irwin, the Medical Director, rebuffed them, telling them that Geter's condition was of his own making and that he could

die in Cell 306 as well as anywhere. Notwithstanding this, the deputies still refused and took Geter to the first floor booking area. After this episode, on April 28th, there was a discussion between Dr. DeMeo and Director Irwin, concerning what action to take, and it was decided that Geter should be admitted to a hospital as a routine admission. However, it was said that no such hospital would admit him in a routine manner, but Good Samaritan Hospital accepted him as an emergency. When asked what prompted the decision to hospitalize Geter, Dr. DeMeo stated, "he was dying." (R-39-3).

From the time he was transported to the hospital on April 28, 1982, until 2:00 o'clock P.M. on April 29, 1982, this inmate remained in a comatose state. He died on April 29, 1982, at 2:00 o'clock P.M.

Investigative report shows that Dr. DeMeo testified that the reason for death was "the man did not get proper electrolytes and fluids," and that his condition was directly

related to malnutrition. (R3-39-3).

Again, at the trial, the Jury heard the psychiatrist, Dr. Fernando Lopez, testify that this schizophrenic, whenever he was taken off of his medication, developed a delusionary fault, believing something was wrong with him. (R4-144). In this instance, his inability to swallow - that had a physical basis due to tonsillitis - continued on a delusionary basis for such inability after the tonsillitus was cured. When asked in cross examination if this was a facade to avoid going to trial, the doctor answered:

> "...The happenings leading up to his death cannot be a faked, cannot be faked. Cannot be voluntarily controlled." (R4-152).

When this inmate found himself unable to intake food and water and receiving no understanding of his dilemma, he contacted his mother, Jessie Geter, in Montgomery, Alabama, to come and try to intervene on his behalf. (R3-100). This she did, and

there followed a series of visits to the jail and to the Chambers of Judge Rodgers. Judge Rodgers tried to persuade the official personnel that defendants provided for communication to take steps to stop Geter's involuntary plunge to death by starvation. The mother's own pleas were added, and on the few times she was permitted to see her son, he was so weak, he had to be supported to get to the visiting window. Only after prompting did he recognize his mother. (R3-102). Defense counsel, Dean Wilbur, met with no more help in getting proper care. (R3-39-3), (R5-293). The attitude of the defendants' personnel (reflecting the kind of policy that was in vogue), can also be demonstrated by the way this critically ill man was maintained, even in his cell. It was the testimony of former deputy Anthony Henry that he and other personnel were ordered to place Geter in his cell, while his body and clothing contained his own feces and vomit. (R3-46, 50).

The ultimate in policy that prevailed in the callous indifference was the Medical Supervisor's report, after a superficial examination, to return the inmate to Cell #306, on April 28, 1982, when his condition was such that he could not even be weighed. (R3-39-3).

It is most earnestly submitted that this Sheriff and this Director of the said Jail institution, as admitted by Sheriff Wille, in his deposition, are directly involved and responsible in the jail operations. It is, likewise, ardently urged that their responsibility of supplying medical and other jail personnel that do not treat inmates in such a cruel, callous manner, and with such inhuman neglect as to causing the death of an inmate is not a matter of simple respondeate superior conduct. Rather, the authorities hereinafter cited show such callous disregard and intentional neglect to be the conduct of those immediately in charge of the facility as alleged in the

complaint.

This basic principle seemed to have escaped the reasoning of the esteemed Justices of the Eleventh Circuit, in their mistaken thinking (on page 3257 of their opinion), when they observed as claimed by the respondents that Geter was responsible for his own death, and that he had intentionally starved himself to death, ("...literally starving himself to death").

Nowhere is it more clearly demonstrated that this inmate did not, as stated in the decision, starve himself to death than is shown in the statement of Deputy Sheriff Vito Colucci to Inspector Pimm and Officer Owens, as the same was admitted into evidence: (R3039), Plaintiff's Exhibit "4" - Colucci, page 4).

"A: (Colucci) Yeah. Even his features were getting bony, his face. He looked awful. He looked, like, yellow, kind of yellowish.

"Q: (Owens) Okay. In our earlier conversation, you mentioned that

he told the nurse that he couldn't eat, and that he wanted to be fed intravenously. Did you actually hear him tell the nurse this?

"A: (Colucci) No, he told me that.

"Q: (Pimm) Okay.

"A: (Colucci) He says, I'd like to be fed intravenously, you know. So I told Generoso - I says, he wants to be fed intravenously - and she told me that "Yeah, 'cause he wants to go to the hospital".

"Q: (Pimm) So that was the end of the conversation, as far as that was concerned, right? He asked to be fed intravenously, and you mentioned that to the nurse, and she said, "Well.....

"A: (Colucci) Yeah, then she says that "he should go to Hollywood and get an award....."

In his own helpless state, to secure essential medical assistance, Geter begged fervently and persistently for help, from any and everyone he could contact, including the Circuit Judge, and as previously stated,

these being the very personnel that the defendants supplied to keep them informed. This could not be more true, if this atrocious conduct was reported to the defendants' receptionist, in their absence from their offices.

In submitting authorities to this Court, that the evidence permitted the Jury to find that the defendants, the Sheriff and the Director, in the due course of their responsibilities, knew, or should have known, of what was happening to inmate Geter, it would first submit the elementary principle that must prevail before the trial Court can direct a verdict or set aside a verdict, unless the Jury had no evidence or no inference therefrom, looking at the same in a light most favorable to the plaintiff.

This cardinal rule is set forth in Berner v. British Commonwealth Pacific Airlines, Ltd., (1965, CA2 NY), 346 F2d 532, cert den. 382 US 983, 15 L Ed 2d 472, 86 S Ct, 559.

> "It is jury, not court, which is fact finding part and weighs contradictory evidence and inferences, judges credibility, receives expert instructions, and draws ultimate conclusions as to facts, and courts are not free to reweigh evidence and set aside verdict merely because jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

The principle of causal connection or responsibility in the chain of command for callous disregard or deliberate indifference in the matter of medical treatment is pointed up that in Estelle v. Gamble, (a prison warden), 429 US 97 (1976), 97 S.Ct. 285, where the Court stated on page 103:

> "These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorties to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death.'" (emphasis ours).

The Supreme Court further stated in Estelle at Page 104:

> "We therefore conclude that deliberate

> indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain.'"

The pronouncements in Ancata v. Prison Health Services, Inc., 769 F.2d 700 (11 Cir. 1985), answer these respondents' contentions on respondeate superior v. deliberate indifference with this language appearing on page 104:

> "The knowledge of the need for medical care and intentional refusal to provide that care has consistently been held to surpass negligence and constitute deliberate indifference. See Robinson v. Moreland, 655 F.2d 887 (8th Cir.1981). In Ramos v. Lam, 639 F 2d 559, 575 (10th Cir. 1980), cert. den. 450 U.S. 1041, 101 S.Ct. 1759, 68 L. Ed. 2d 239, (1981), the court said:
>
> 'Deliberate indifference to serious medical needs is shown when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment.'"

* * *

"...Intentional failure to provide service acknowledged to be necessary is the deliberate indifference prescribed by the Constitution." See Woodall v. Foti, 648 F.2d 268, 272-73, (5th Cir. 1981).

In fact, the ruthlessness and totally inhuman disregard for life in Ancata, supra, was not nearly so apparent as was reflected by the evidence here. There, as here, the medical department of the incarcerating facility, the Broward County Jail, was totally remiss in taking steps that would have revealed that an inmate was, in fact, suffering from leukemia. Only after he was hospitalized by other processes and not with the cooperation of said medical department, was the inmate able to obtain a proper diagnosis. Thereafter, he died of leukemia. Absent in Ancata was the overt expressions, as well as the actions of deliberate indifference, and even expressions of contempt of the inmate Geter's suffering up until the time of his death. Nor does it seemingly appear that the personnel claim that inmate was faking illness.

This Court also made it clear in Ancata that a Sheriff's responsibility, where his medical staff deliberately fails to provide

necessary medical care, is not merely a matter of respondeat superior if he breached a duty imposed upon him to furnish medical care. Here the investigating inspector, Brian Pimm, testified that this Sheriff's and this Director's chain of command were not carrying out prescribed orders when they determined to allow the inmate Geter to starve to death while he proclaimed he could not swallow food or liquids. The affirmative link was therefore supported by overwhelming evidence.

In Miranda v. Munoz, 770 F. 2d 255, (1st Cir. 1985), there too, an inmate was permitted to go without proper treatment, and there too, his medical background was ignored to a point beyond recovery and consequently, he died. This case was brought against a warden, an assistant warden, and a physician of a Puerto Rican prison. The Court stated on page 259:

> "We think the jury properly could find this to be a case of medical attention so inadequate that it

represented 'deliberate indifference' on the part of the three defendants found liable."

And the Court stated also on page 259:

"...It could be found that the defendants ignored a clear warning that the medical treatment they provided for Rosario Cristobal was inadequate, allowing him to deteriorate beyond recovery. We, therefore, uphold the district court's decision not to grant judgment n.o.v. for Dr. Mora Boneta, Warden Candelaria Alonso and Assistant Warden Vargas Maldonado."

In the Miranda case, it was also contended on appeal that a directed verdict should be granted on the theory that there is no respondeat superior liability under §1983. But the Court noted that on page 260:

"supervisory officials may be found liable only on the basis of their own acts or omissions. Supervisors need not have actual knowledge of the specific incident at issue, however, if they had the power and duty to alleviate the conditions which led to the violation."

That these defendants had knowledge of Géter's unchecked progression towards death, it can only be said that they did, or certainly they should have had knowledge because the

very personnel that they set up for communication to them were saturated with notice after notice and complaint after complaint about how Geter's case was being handled or not handled. From the time that Judge Rodgers made his routine inspection with such a representative and received promises of positive action, until the time that he related in his testimony:

> "..And I said, well, that'a all the more reason, that I want somebody to go in and examine Mr. Geter, and if you're reluctant to do it, I'll take the blame by ordering the Sheriff to have somebody outside of the jail to go inside and see him.
>
> "Because I just felt at that time that Mr. Geter was ill, and was in need of help, and that I was just totally dissatisfied with the whole situation.
>
> "I did not act soon enough, I guess. Subsequently, I was informed that Mr. Geter had died." (R3084).

As earlier pointed out, such requests were pouring in from the mother, defense counsel, and jail personnel. (R3-39-1 Plaintiff's Exhibit "4", Pimm's report.)

The Eleventh Circuit reversel in Love

v. Sheffield, 777 F.2d 1453 (11th Cir.1985), (wherein an evidentiary hearing conducted by a magistrate whose recommendation was accepted by the United States District Court Judge), the magistrate concluded that the defendants were entitled to a directed verdict as is claimed here. The Court pointed to its' holding in Gilmere v. City of Atlanta, 774 F. 2d 1495 (11th Cir. 1985) and stated at page 1454:

> "Our review of the evidence adduced by Love before the magistrate indicates that a reasonable person could find that the defendants were aware of both the danger of Love and his need for medical care and yet chose not to take reasonable steps to protect and care for him. Accordingly, a directed verdict was not warranted and Love is entitled to a new trial."

Hence, the jury could, if they believed the plaintiff's evidence, establish an affirmative link between those charged with the responsibility, for providing medical personnel, treatment, and care, and those in the chain of command who failed in the carrying out of such essential functions. While as res-

pondents pointed out on appeal that in some of petitioner's authorities the plaintiff had not ultimately prevailed, nevertheless the law pronounced is sound and applicable to the facts in this case.

In McClelland v. Facteau, 610 F.2d 693 (10th Cir 1979), the Court said at page 69:

> "the law clearly allows actions against supervisors under section 1983 as long as a sufficient causal connection is present and the plaintiff was deprived under color of law of a federally secured right."

and on page 697:

> "Next we consider the police chiefs' duty of supervision to correct misconduct of which they have notice. We agree with those courts that have found a cause of action under section 1983 when the defendant was in a position of responsibility, knew or should have known of the misconduct, and yet failed to act to prevent future harm. E. g., Sims v. Adams, 537 F.2d 829 (5th Cir. 1986); Wright v. McMann, 460 F.2d 126 (2d Cir.), cert denied, 409 U.S. 885, 93 S.Ct. 115, 34 L.Ed. 2d 141 (1972). The standard to be applied is the conduct of a reasonable person, under the circumstances, in the context of the authority of each police chief and what he knew, or should have known. We find there is genuine issue of fact whether defendants breached this duty.
>
> "The rules and regulations cited of

> both police hierarchies indicate that the immediate and direct duty to supervise has been delegated, but the police chiefs have retained the ultimate responsibility of what goes on in the departments. The perimeters of their duty are uncertain and must be determined at trial."

As was stated in Slakan v.T. C. Porter, 737 F. 2d, 368 (4th Cir.1984) at page 373:

> "A supervisor's continued inaction in the face of documented, widespread abuses, however, provides an independent basis for finding he either was deliberately indifferent or acquiesed in the constitutionally offensive conduct of his subordinates."

The Court followed with the pronouncement on that same page:

> "..The outer limits of liability in any given case are determined ultimately by pinpointing the persons in the decision-making chain whose deliberate indifference permitted the constitutional abuses to continue unchecked. The final determination "generally is one of fact, not law,'" Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1981).

In the well reasoned case, Miga v. City of Holyoke, etc., Supreme Judicial Court, (Mass. 1986), 497, N.E. 2d,1, the trial court had awarded compensatory and punative damages for a suicide hanging of plaintiff's decedent

(Sandra) while in the City of Holyoke's protective custody and in the custody of its' chief of police and other police officers. Verdicts were returned for both compensatory and punative damages and differing sums against different defendants.

The contentions by the appellant there are very similar to the contentions of these defendants. Although the police officers who had Sandra in custody had information available to them that they were dealing with a person with mental and emotional problems, and though she was unable to stand or walk by herself, and although she had lapsed into unconsciousness on the way to the police station, she was taken into custody without any attempt being made to get her medical attention. The City of Holyoke had rules and regulations concerning the handling of a person under the conditions here present. However, no attempt was made to communicate with Sandra's husband, or to otherwise take any proper care or treatment

even though she was obviously intoxicated and periodically lapsed into unconsciousness. After being booked, Sandra was carried to a cell. Because she was thrashing about, she was placed on a concrete floor. Though other persons reported that she was banging on her cell and asking for belts and shoe laces, and a woman inmate yelled that Sandra was trying to kill herself, there was no response. The following morning, Sandra's body was found hanging from the bars of her cell.

As in the instant case, the trial judge there evaluated the evidence for a directed verdict on the §1983 claim in the light most favorable to the plaintiff. There was cited many authorities on the well-established principles that if anywhere in the evidence and from whatever source derived, there was any combination of circumstances upon which the triers of the fact could draw reasonable inferences of the plaintiff. And, there followed comment on the fact that such inferences reasonable required that such be

based on probabilities and not possibilities, nor on mere conjecture. The Court stated: (Only filed Opinion available to counsel, citation obtained by long-distance telephone request.)

> "The Holyoke police department rules specifying the care and monitoring intoxicated, unconscious, and suicidal persons in custody should receive, dictate the minimum level of care to which standards of basic human decency entitle such persons."

(ii)

The Respondent has made, as an issue on their appeal to the Eleventh Circuit, the claim that the District Court erred in not directing a verdict as to the claim of punative damages. The Circuit Court, in reversing the judgment, stating in effect that since the plaintiff could not maintain this civil rights action, it was unnecessary to pass on the question of punative damages, but then commented in a footnote to the decision that in the case of City of Newport v. Facts Concerts, Inc. 453 U.S. 247, 272, 101

S.Ct. 2748, 2762, that this Court concluded that governmental agencies cannot be held liable for punative damages in a Section 1983 action.

Here again, Petitioner says the Circuit Court misapplied its' own decision to others by that Court and this Court and other Circuits. Again, the decision in City of Newport vs. Facts Concerts, Inc., supra, applied to a governing body whose policy, if it brought about the constitutional deprivation of a civil right was not so directly involved in the physical harm then logically such should not invoke the punishment and deterrent reasons for punitive damages.

Not so with Federal Court decisions where the culprit is the person, through his own operation of his facility brings on the suffering, and in this case, the death of the institutionalized.

Where there is such evidence of gross indifference and miscarriage of a person's civil rights, and particularly where such

disregard involves human suffering and human life, punitive damages have constantly been held to be a vanguard, both by economic sanction, and as a future deterrent to such gross violation. Said right to recovery does not depend upon pendant state law, but is available under federal common law. As was stated in Sullivan v. Little Hunting Park., Inc., 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed. 2d 386,(1969), the Court, in an opinion written by Mr. Justice Douglas, said:

> "This means, as we read §1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. Brazier v. Cherry, (5 Cir.) 293 F.2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired."

To the same effect is Gordon v. Norman, 788,F 2d,1194(6th Cir.1986). Which body of law on punitive damages should be applied in a given case depends on the circumstances disclosed by the evidence and is therefore a jury question. The Court stated on Page 1199:

"Punitive damages for deprivation of civil rights may be awarded when the defendant wilfully and intentionally violates another's civil rights or when the defendant acts with reckless or callous indifference to the federally protected rights of others. Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). The allowance of such damages involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent. Therefore, the infliction of such damages, and the amount thereof when inflicted are of necessity within the discretion of the trier of fact. Busche v. Burkee, 649 F.2d 509, 520 (7th Cir.1981)."

It was likewise in Caperci v. Huntoon, 397 F.2d 799 (1st Cir. 1968), cert denied 89S. Ct. 299. There the Court stated on page 801:

"It is true that in Massachusetts, punitive damages are not normally recoverable. However, we believe, on balance, that the remedial purpose of the Act is better served by not permitting local variations, allowing diminution of the amount of recovery. Rather, we will look to federal common law. Basista v. Weir, (3 Cir.1965), 340 F.2d 74; Mansell v. Saunders, (5 Cir.1967) 372 F.2d 573; cf. U.I. Case Co., v. Borak, (1964) 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423.

"As to whether punitive damages were

warranted in this case, defendants argue that police officers, 'acting in good faith with no evil intent... should not be subject... to punitive damages.' We agree with the principle. There was ample evidence, however, warranting a find that the defendants did not come within it. The female plaintiff's concession that defendants 'acted like gentlemen' did not mean that their conduct was not an outrageous invasion of plaintiff's privacy without color of right and for an improper motive."

Also, in McDaniel v. Carroll, 457 F 2d,968, 6th Cir., 1972, the Sheriff against whom punitive damages were awarded argued:

"That punitive damages should not have been assessed against him for the reason that he was not present when the shooting occurred and did not participate in it, and did not authorize or ratify it."

But, the Court stated on Page 969:

"It is undisputed that at the time of the shooting the deputy sheriff was endeavoring to serve an arrest warrant, which was in the performance of his official duty. The shooting was entirely unjustified and without warrant in law. No claim is made that the verdict was not supported by substantial evidence.

Federal law permits the recovery of punitive damages in actions under the Civil Rights Acts. Caperci v. Huntoon, 397 F.2d (1st Cir.), cert. denied, 393 U.S. 940, 89 S.Ct. 299, 21 L.Ed.2d 276

(1968); Mansell v. Saunders, 372, F. 2d 573 (5th Cir. 1967); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

The case of Morales v. Haines, et. al., 486 F.2d 880 (7th Cir. 1973), while addressing a 42 USC, §1982 complaint on the question of punitive damages, the Court there made it abundantly clear that the same damages apply to a §1983 case. Upon finding that such damages may be awarded under §1982, the Court stated on Page 882:

> "Punitive damages (McDaniel v. Carroll), 457 F. 2d 968 (6th Cir.1972) and attorneys' fees (Monroe v. Board of Commissioners, 453 F.2d 259, 262-263 (6th Cir. 1972) may also be awarded in a §1983 case.
>
> "Thus the finding of the presence or absence of racial discrimination is material to the resolution of the plaintiff's prayers for actual and punitive damages and attorneys fees and that finding should be made. 'Where the trial court fails to ... find on a material issue ... the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made.' 5A J. Moore, Federal Practice 52.06 (2), at 2718 (2d ed. 1971).
>
> "That part of the judgment denying actual and punitive damages and attorneys' fees is vacated."

The Court's attention is called to Miga v. Holyoke, supra, in which punitive damages were affirmed.

CONCLUSION

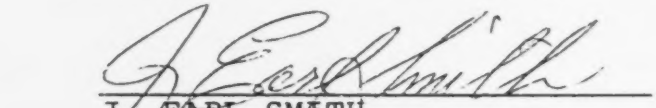
Sinisterness has marked this whole ominous scenario surrounding Inmate Geter's death. The courageousness of Inspector Brian Pimm, Internal Affairs Investigator, to make findings based on his thorough investigation were hampered by bureaucratic, if not political interference. His original report made eight specific findings that reflected a jail run with a chaotic and infamous attitude toward the medical needs of inmates. His superiors ordered these findings stricken which appears as Plaintiff's Exhibit "3" in Pimm's deposition, but as were here earlier reflected, they were admitted into evidence at trial.

This report was signed by the Inspector on May 14, 1982, but was not signed by his Supervisor. Rather he was ordered to remove

the findings ("tone it down"). The report was sent to petitioner's counsel anonymously and only the report with the findings removed was put into the State of Florida's Official Records.

It is a matter of common knowledge in the Palm Beach area that the press and media have bombarded the unusual deaths, beatings and suicides in the Palm Beach County Jail. For it to be said that these defendants did not know what was happening to Thomas Geter is even a greater admission of callous disregard and total indifference toward human life.

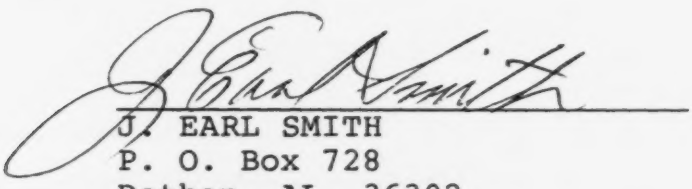
Respectfully submitted,



J. EARL SMITH
Attorney for Petitioner
P. O. Box 728
Dothan, AL 36302
Telephone No. 205/792-3188

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished three (3) copies of the foregoing Petition for Certiorari and Appendix thereto to James C. Barry, Esquire, P. O. Box 2069, West Palm Beach, Florida 33402, Attorney for Respondents, by United States Mail, postage prepaid and properly addressed this 21st day of November, 1988.



J. EARL SMITH
P. O. Box 728
Dothan, AL 36302
Telephone No. 205/792-3188
Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO._____

JESSIE GETER, Administratrix of the
Estate of THOMAS GETER, JR., Deceased,

PETITIONER,

Versus

RICHARD WILLE, Sheriff of Palm Beach County,
Florida, and GERALD TOLES, Director of
Corrections of Palm Beach County, Florida,

RESPONDENTS.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

J. EARL SMITH
ATTORNEY FOR PETITIONER
P. O. BOX 728
DOTHAN, ALABAMA 36302
TELEPHONE NO. 205/792-3188

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-5498

FILED
Aug. 24, 1988

JESSIE GETER, Administratrix of the Estate of Thomas Geter, Jr., Deceased,

Plaintiffs-Appellees,

versus

RICHARD WILLE, Sheriff of Palm Beach County and Gerald Toles, Director of Corrections of Palm Beach County, Florida,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion June 14, 1988, 11 Cir., 1988, ____F.2d____).

(August 24, 1988)

Before FAY and VANCE, Circuit Judges, and HOFFMAN*, Senior District Judge.

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), and Suggestion(s) of Rehearing In Banc are DENIED.

Jessie GETER, Administratrix
of the Estate of Thomas Geter,
Jr., Deceased,
Plaintiffs-Appellees,

v.

Richard WILLE, Sheriff of
Palm Beach County and Gerald
Toles, Director of Corrections
of Palm Beach County, Florida,
Defendants-Appellants.

No. 87-5498

United States Court of Appeals,

Eleventh Circuit.

June 14, 1988.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and VANCE, Circuit Judges, and HOFFMAN*, Senior District Judge.

FAY, Circuit Judge:

Thomas Geter tragically died while an inmate in the Palm Beach County Jail. Geter claimed that he was unable to swallow

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of of Virginia, sitting by designation.

and refused to eat or drink, literally starving himself to death. Geter's mother brought a 42 U.S.C. § 1983 ("Section 1983") action against the Palm Beach County Sheriff and the Director of Corrections. She did not sue defendants individually or join to the suit any other parties having direct contact with Geter while he was in custody. The plaintiff prevailed at trail and the defendants appealed. The primary issue before this Court is whether the district court should have directed a verdict for these defendants. Because we find error, we reverse.

1. BACKGROUND

In June of 1980, Thomas Geter was being held at the Palm Beach County Jail ("jail") on charges of first degree murder and sodomy. Suspecting mental problems, the court appointed a psychiatrist to examine Geter. The psychiatrist concluded that Geter was incompetent to stand trial

and suggested further evaluation. The sheriff's office then sent Geter to the North Florida Evaluation and Treatment Center at Gainesville where doctors diagnosed him as suffering from chronic undifferentiated schizophrenia. By September, 1981, Geter was in remission, and judged competent to stand trial. The sheriff's office then returned him to jail.

While Geter was in custody awaiting trial, he was totally dependent upon the Palm Beach County Sheriff's Office for medical care and help. The sheriff's office furnished a nursing staff and paid for a physician who was an independent contractor. The applicable regulations and policy gave the contract physician the authority to make all medical decisions at the jail.

Upon Geter's return, the jail's medical personnel gave him a physical examination and found him to be in good physical

health. In late March, 1982, Geter began to complain to officers and nurses that he had a sore throat and could not swallow. The jail's contract physician diagnosed the condition as tonsillitis and treated it accordingly. But even after Geter recovered from his tonsillitis, he continued to complain that he could not eat.

Geter's physical condition visibly deteriorated. Geter had weighed 183 pounds when he first arrived at the jail, but when the doctor treated him for tonsillitis he weighed 159.5 pounds. By April 14, Geter's weight had dropped to 144 pounds.

When the doctor determined that he could find no medical reason why Geter could not swallow, he scheduled Geter for examination by a private throat specialist. This physician also could not find any physical reason for Geter's inability to swallow, therefore, he ordered x-rays

taken of Geter's esophagus. Geter refused the x-rays, claiming he was unable to swallow the barium.

On April 23, 1982, Geter's weight had fallen to 136 pounds. Due to his weakened condition, it was not possible to weigh Geter after April 26. On April 28, he was clearly dying and the jail's doctor sent him to Good Samaritan Hospital. Geter died the next day. According to medical records, a number of physical ailments brought on by the failure to eat or drink caused his death.

Jessie Geter, the decedent's mother, brought this action under Section 1983. Plaintiff chose to name only the Sheriff and the Director of Corrections of Palm Beach County, Florida as defendants. In addition, she only brought the claim under Section 1983 and thus sued them solely in their official capacities. The gravemen

of her Section 1983 complaint is that defendants knowingly, willfully, and negligently failed to provide for Geter's medical needs while he was in their custody. The jury awarded compensatory damages of $50,000 and punitive damages of $100,000. Defense counsel had moved for a directed verdict, and after the jury's decision to award damages, moved for a judgment notwithstanding the verdict, but the discourt denied both motions.

II. DISCUSSION

Appellants contend that the trial court should have directed a verdict in their favor. Appellants argue that none of the evidence presented by the plaintiff established liability under Section 1983. They claim that at trial plaintiff did not demonstrate any causal connection between them and the events leading to plaintiff's injuries. Appellants contend that without

such a showing, plaintiff cannot prevail.

In this case plaintiff attempted to establish that the employees of the sheriff's office and the contract pbysician were negligent and violated Geter's constitutional rights. Plaintiff did not sue the physician or other involved medical employees, but only their superiors. Appellants claim that plaintiff based this action on a theory of respondeat superior, and that the trial court erred when it permitted a judgment for the plaintiff under this doctrine.

(1) Plaintiff maintains that she did not prevail based on a respondeat superior theory, but that the jury found there existed a policy of callous indifference toward Geter evidenced by the doctor's order to return Geter to his cell when he was too week to be weighed. Supervisory officials cannot be held liable for the

acts of employees solely on the basis of respondeat superior. McLaughlin v. City of LaGrange, 662 F.2d 1385, 1388 (11th Cir. 1981). However, a local government[1] is liable under Section 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury...." Monell v. Department of Social Services, 436 U.S.658, 694, 98 S. Ct.2018, 2037-38, 56 L.Ed.2d 611 (1978). See also Hearn v. City of Gainesville, 688 F.2d 1328, 1334 (11th Cir.1982).

1. Because the plaintiff sued the defendants in their official capacity, this is in effect a suit against Palm Beach County. Official capacity suits are "in all respects other than name, to be treated as a suit against the (governmental) entity." Kentucky v. Graham,473 U.S.159, 166105 S.Ct.3099,3105,87L.Ed2d 114 (1985) Thus, the law governing the liability of the Sheriff and the Director of Corrections in their official capacity. See id. at 166-67,105 S.Ct.at 3106. See also Brown v. Smith,813 F.2d1187,1187(11th Cir.1987) (rejecting respondeat superior as a theory of liability for supervisory government officials).

(2) There is simply no evidence in the record showing that either the sheriff's office or the jail had any policies, customs, or usages relating to the events that led to Geter's death. Without any evidence that the supervisory employee participated in or condoned the alleged deprivations, there can be no Section 1983 liability for the acts of the subordinates.[2]

Supervisor liability is also permitted in those incidents in which the supervisor personally participates in the deprivation. Goodson v. City of Atlanta, 763 F.2d 1381, 1389 (11th Cir. 1985). But nothing in the record

2. In the instant case, not only was there a total failrue of pleading or proof on the issue of policy, custom or usage, but the record did not contain even a suggestion of fault by the sheriff's office. See Owens v. City of Atlanta,780 F.2d 1564,1567(11th Cir.1986)(holding that "the municipality must be at fault in some sense for establishing or maintainingthe policy"or informal custom ing the "force of law" which causes the injurious result).

demonstrates that appellants personally participated in the allegedly unconstitutional treatment of Geter. Plaintiff's only reference to Gerald Toles is the stipulation which states that he was the Director of Corrections, and that the jailers and medical staff other than the contract physician reported to him. The record is void of any other pleadings or evidence linking Toles to Geter's death.

The plaintiff's case against Sheriff Wille has similar problems. During a deposition Wille conceded that he is ultimately responsible for the management and conduct of the jail and that all of the participants, except the contract physician, ultimately reported to him. The record, however, does little, if anything, to show that Sheriff Wille was in any way involved in any mistreatment

of Geter.

Plaintiff argues, and the trial court concluded, that the defendants are liable because they had the right to control the jail and all of relevant personnel except the jail's physician, who was an independent contractor. The Sheriff and the Director of Corrections do have authority over the actions of the medical personnel involved. We note, however, that "the mere right to control without any control or direction having been exercised...is not enough to support § 1983 liability." Monell, 436 U.S. at 694 n.58, 98 S.Ct. at 2037 n.58. There is no evidence that the Sheriff or Director of Corrections exercised control over Thomas Geter's situation. Without any proof in the record, Wille and Toles cannot

be held liable under this theory.[3]

III. CONCLUSION

The seriew of events leading to Geter's death were unquestionably tragic. The jury, apparently consumed by this misfortune, wanted to make someone pay for what happened to Geter. However, the plaintiff failed to prove her case against these defendants. The record shows that Geter received extensive medical attention. His condition was not ignored. The fact that the physicians

3. Appellants also argue that the trial court erred in allowing an award of $100,000 in punitive damages. Because we have determined that the trial court erred in failing to direct the verdict for the defendants, we find this issue moot. However, we note that the Supreme Court has concluded that governmental agencies cannot be held liable for punitive damages in a Section 1983 action. City of Newport v. Fact Concerts,Inc., 453 U.S.247,272,101 S.Ct.2748,2762,69 L.Ed.2d 616 (1981).

involved may have failed to properly handle this medical situation cannot be imputed to these defendants. Even in the most tragic circumstances, our judicial system cannot award recovery against apparently innocent defendants. Therefore, we must REVERSE.

JESSIE GETER, Administratrix of the ESTATE OF THOMAS GETER, JR., Deceased,

Plaintiff,

vs.

RICHARD WILLE, SHERIFF OF PALM BEACH COUNTY, FLORIDA, FLORIDA, et al.,

Defendants.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA.

CASE NO.84-8065-CIV-GONZALEZ

JUDGMENT

This cause having come on for trial before this Court and a duly qualified and impaneled Jury on the 20th day of April, 1987, and verdict having been rendered for the plaintiff on the 22nd day of April, 1987, in the amount of Fifty Thousand ($50,000.00) Dollars as compensatory damages and One Hundred Thousand ($100,000.00) Dollars as punitive damages, it is hereby

ORDERED AND ADJUDGED that judgment for the plaintiff is entered for $50,000.00

as compensatory damages and $100,000.00 as punitive damages.

This Court hereby reserves jurisdiction to any necessary Orders taxing costs and attorneys' fees upon Motion of the parties.

DONE AND ORDERED AT Fort Lauderdale, Florida, this 28th day of April, 1987.

/s/Jose A. Gonzalez
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

JESSIE GETER, ADMINISTRATRIX
OF THE ESTATE OF THOMAS
GETER, JR., DECEASED.

PLAINTIFF

VS.

CIVIL ACTION NO.
84-8065-CIV-JAG

RICHARD WILLE, SHERIFF
OF PALM BEACH COUNTY,
FLORIDA AND GERALD
TOLES, DIRECTOR OF
CORRECTIONS, PALM
BEACH COUNTY, FLORIDA,

DEFENDANTS

VERDICT

WE THE JURY find for the plaintiff, JESSIE GETER and against the Defendants, RICHARD WILLE, and GERALD TOLES and award her $50,000 as compensatory damages and $100,000, as punitive damages.

SO SAY WE ALL:

/s/Joseph D. Owens

STATUTES

Title 42, USC, 1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the Constitution of the United States

(Rights of Accused in Criminal Proceedings)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis ours)

Eighth Amendment to the Constitution of the United States

(Bails, Fines, Punishments)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (Emphasis ours)

Fourteenth Amendment to the Constitution of the United States

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5.

(Power to Enforce This Article)

The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

88-1071

Supreme Court, U.S.
FILED
DEC 16 198
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO._____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

JESSIE GETER, Administratrix of the Estate of THOMAS GETER, JR., Deceased,

Petitioner,

vs.

RICHARD WILLE, Sheriff of Palm Beach County, Florida, and GERALD TOLES, Director of Corrections of Palm Beach County, Florida,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

JAMES C. BARRY
ADAMS, COOGLER, WATSON & MERKEL, P.A.
Attorneys for Respondents
Post Office Box 2069
West Palm Beach, Florida 33402
(407) 478-4500

(a)

QUESTION PRESENTED FOR REVIEW

Should the United States Supreme Court invest its limited resources by exercising its judicial discretion to review, by way of Writ of Certiorari, the decision of the Eleventh Circuit Court of Appeals which found that the Record was void of evidence or proof that the named Defendants, in their official capacity, were in any way involved with the Plaintiff's death?

(b)

Petitioner's Statement of the parties to the proceeding is agreed to by the Respondents.

(c)

TABLE OF CONTENTS

PAGE

Question Presented For Review.....i

Parties to the Proceeding.....i

Table of Contents.....ii

Table of Authorities.....iii

Jurisdictional Grounds.....iv

Statutes and Rules.....iv

Statement of Case.....v

Summary of Argument.....v

Argument.....1

Summary.....8

Certificate of Service.....9

Appendix.....10

TABLE OF AUTHORITIES

PAGE

Ancata v. Prison Health Services, Inc.,

769 F.2d 700 (1st Cir. 1985)..... 2,3

Estelle v. Gamble,

429 U.S. 97 (97 S.Ct. 285 1976).....1

Love v. Sheffield,

777 F.2d 1453 (11th Cir. 1985).....2

McClellan v. Facteau,

610 F.2d 693 (10th Cir. 1979)..... 1

Miranda v. Mundy,

770 F.2d 255 (1st Cir. 1985)..... 1

Slakan v. T.C. Porter,

737 F.2d 368 (4th Cir. 1984)..... 2

(e)

JURISDICTIONAL GROUNDS

Petitioner's Statement of Jurisdictional Grounds is agreed to by the Respondents.

(f)

STATUTES AND RULES

U.S. Supreme Court Rule 17.1

(Text included in Appendix)

Title 42, USC, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

(g)

STATEMENT OF THE CASE

With one addition and except for the characterizations, hyperbole, invective, and syntax, the Petitioner's Statement of the Case is accepted. The addition is to quote Paragraph Three of the Plaintiff's Complaint: "The Defendants are the duly qualified agerts of the County of Palm Beach, State of Florida, and are sued in their official capacity."

(h)

SUMMARY OF ARGUMENT

This is not a case in which there are special and important reasons for this Court granting a Writ of Certiorari.

(i)

ARGUMENT

Recognizing that Rule 17.1 does not set forth exhaustive parameters of when Certiorari will be granted, the Rule nevertheless strongly suggests the kinds or types of cases in which this Court will grant Certiorari. In summary, it indicates that Certiorari will be granted only in cases of peculiar gravity and general importance or in order to secure uniformity of decisions. It is suspected that the gravamen of the Petition is to demonstrate that the Eleventh Circuit, in the case sub judice, is in conflict with decisions of other Circuit Courts of Appeal, but the cases cited by Petitioner are all distinguishable or inapposite.

Estelle v. Gamble, 429 U.S. 97 (97 S.Ct. 285 1976), Miranda v. Mundy, 770 F.2d 255 (1st Cir. 1985), McClellan v. Facteau, 610 F.2d 693 (10th Cir. 1979)

and Slakan v. T.C. Porter 737 F.2d 368 (4th Cir. 1984) all involve situations where the supervisory personnel were sued in their individual capacity. In the instant case, the two Defendants were sued only in their official capacity. As will be argued more extensively later, this difference is crucial. Love v. Sheffield, 777 F.2d 1453 (11th Cir. 1985) is not despositive of anything in that the issue therein was the sufficiency of evidence.

Ancata v. Prison Health Services, Inc., 769 F.2d 700 (1st Cir. 1985) is closer to the mark. There are, however, two major distinctions. First of all, in Ancata, Plaintiff alleged that there was a custom, usage or policy which led to the Plaintiff's injuries. The Court in Geter found that there simply was no evidence showing that the Sheriff's Office or the Jail had any policies,

customs or usages relating to the events that led to the Plaintiff's death. Secondly, all the Court in Ancata was deciding was whether the Complaint had stated a cause of action so as to withstand a Motion to Dismiss, whereas in the instant case, the Eleventh Circuit decided that, not only was there insufficient pleading of a custom, but there was absolutely no evidence of a custom or policy.

Petitioner has not cited any Florida Court of last resort in conflict with the decision of the Eleventh Circuit and, therefore, the decision does not involve a Federal question in conflict with a State Court of last resort. Neither has the Petitioner attempted to show that the decision of the Eleventh Circuit so far departed from the accepted and usual course of judicial proceedings as to call for this court to exercise its

power of supervision. Lastly, there does not appear to be any claim that the Eleventh Circuit has decided an important question of Federal Law which has not been to date decided by the Supreme Court.

Petitioner seems to suggest that the issue is whether, on the facts which Petitioner argues so inflamatorily, the Eleventh Circuit erred in its decision. Respondents submit that, if this Court grants a Writ of Certiorari, that will then be the issue. The issue before this Court now, however, is whether the decision of the Eleventh Circuit involved such special and important issues or was so in conflict with other Circuit Court opinions as to require the expenditure of this Court's judicial resources.

Even a cursory reading of the Eleventh Circuit's opinion demonstrates that this question must be answered in

the negative. The Eleventh Circuit determined two things: (1) "Supervisory officials cannot be held liable for the acts of employees solely on the basis of respondeat superior" and (2) "Without any evidence that the supervisory employee participated in or condoned the alleged deprivations, there can be no Section 1983 liability for the acts of the subordinates." Geter v. Wille, Page 3259. These holdings are clearly within the mainstream of decisional law.

Petitioner wants to have the issuance of the Writ of Certiorari turn on the facts of the case. This is why they argue the facts so vociferously and extensively. Egregious facts, however, are not the reasons for granting Writs of Certiorari. It is, however, the facts, or more precisely the lack of facts, which lie at the heart of this case.

Plaintiff chose to sue only two

Defendants and chose to sue those two Defendants only in their official capacity. By so doing, he in effect filed a suit against Palm Beach County. As the Eleventh Circuit said in Footnote 1, "Thus, the law governing the liability of governmental entities under Section 1983 controls the liability of the Sheriff and the Director of Corrections in their official capacity." By so doing, the Plaintiff, albeit perhaps inadvertently, was precluded from proving what the Sheriff and Director of Corrections knew or should have known so as to thereby create their personal liability.

Because there is no vicarious liability under Section 1983 and because the Petitioner, by his pleadings, had in effect sued the County, the Petitioner had to establish that the Sheriff's Office had created a custom or policy,

which custom or policy was the proximate cause of the decedent's injuries. The Eleventh Circuit found that there simply was no evidence in the record of such policies, customs or usages.

At bottom, the Eleventh Circuit found that the Plaintiff had failed to prove the case that he pled. Plaintiff conceivably proved a case against the subordinates or perhaps proved a case of violation of state law, but that was not the case he pled and thereby had to prove. He pled that the County, or the office of the Sheriff, had violated the decedent's civil rights. He had no evidence of that and thereby his case fails.

This is not a case where the decision of the Eleventh Circuit is out of step with anyone. There is nothing in the Eleventh Circuit decision which could not be cited with approval by any other

court dealing with a Section 1983 action against supervisory personnel in their official capacities. There is, therefore, no reason for the United States Supreme Court to grant Certiorari.

SUMMARY

This is not a case involving any special or important decisions nor is this a case in which the decision of the Eleventh Circuit is in conflict with the decisions of other Federal Courts of Appeals on the same matters. This is a case where the Plaintiff's proof, to the extent it was adduced, failed to prove that which he pled. As such, this is not a case in which this Court should grant a Writ of Certiorari.

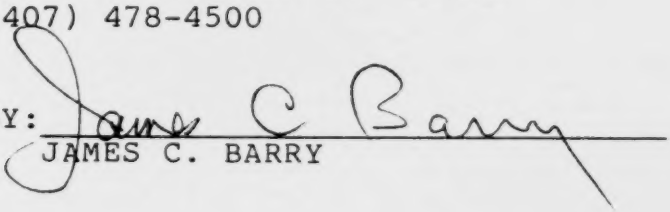
Respectfully submitted,

BY: _____
JAMES C. BARRY
Attorney for Respondents
ADAMS, COOGLER, WATSON & MERKEL, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for Respondents and Appendix thereto have been furnished, by mail, to JACK W. SMITH, ESQUIRE, Attorney for Petitioner, Post Office Box 728, Dothan, Alabama 36302 this 16th day of December, 1988.

ADAMS, COOGLER, WATSON & MERKEL, P.A.
Attorneys for Respondents
Post Office Box 2069
West Palm Beach, FL 33402
(407) 478-4500

BY: 
JAMES C. BARRY

CASE NO._____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

JESSIE GETER, Administratrix of the Estate of THOMAS GETER, JR., Deceased,

Petitioner,

vs.

RICHARD WILLE, Sheriff of Palm Beach County, Florida, and GERALD TOLES, Director of Corrections of Palm Beach County, Florida,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO BRIEF
FOR RESPONDENTS

JAMES C. BARRY
ADAMS, COOGLER, WATSON & MERKEL, P.A.
Attorneys for Respondents
Post Office Box 2069
West Palm Beach, Florida 33402
(407) 478-4500

Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.